Lana Blackwell Trucking, LLC *and* Michael L. Howard. Case 25–CA–28702

September 15, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On April 30, 2004, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lana Blackwell Trucking, LLC, Norman, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraph 2(a), and renumber the subsequent paragraphs.

"(a) Within 14 days from the date of this Order, recall from layoff and offer Michael L. Howard and Maurice Crowe full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Michael L. Howard and Maurice Crowe whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 15, 2004

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to recall from layoff or discharge any of you for engaging in protected concerted activities or union activities in support of Chauffeurs, Teamsters, Warehousemen, and Helpers, Local Union 135, affiliated

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's analysis of the allegations under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), we find sufficient evidence of antiunion animus based on the statement by owner Lana Blackwell that employees Michael Howard and Maurice Crowe were her two best drivers, but they "start too much shit," a reference to their protected activity.

Furthermore, in its exceptions, the Respondent contends that it had the right not to recall employees Howard and Crowe for any reason, including that they engaged in Sec. 7 activity, because the Union had contractually waived their right to recall. We find no merit in this exception. The contract provision cited by the Respondent states only that seniority rights apply to a particular job. The interpretation asserted by the Respondent implies that the Union, in negotiating that seniority provision, was empowered to authorize the Respondent to make recall decisions for discriminatory reasons in contravention of the Act, effectively waiving all of the employees' Sec. 7 rights. However, it is well established that a union cannot negotiate such a waiver. See *NLRB v. Magnavox Company of Tennessee*, 415 U.S. 322 (1974), and *General Motors Co.*, 158 NLRB 1723 (1966) (union cannot waive the Sec. 7 rights of employees to distribute literature).

Finally, in adopting the judge's finding that the Respondent unlawfully failed to recall employee Howard from layoff, we do not rely on his description of Lana Blackwell as a wife and mother of young children who might have been intimidated by Howard, as these facts are irrelevant to the issues involved in this proceeding.

with International Brotherhood of Teamsters, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Michael L. Howard and Maurice Crowe full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael L. Howard and Maurice Crowe whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Michael L. Howard and Maurice Crowe, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

LANA BLACKWELL TRUCKING, LLC

Raifael Williams, Esq., for the General Counsel.
James H. Hanson, Esq. (Scopelitis, Garvin, Light & Hanson), of Indianapolis, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Bloomington, Indiana, on November 17–18, 2003, upon a complaint, dated August 27, 2003, alleging that the Respondent, Lana Blackwell Trucking, LLC, violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) for failing to recall from layoff and discharging its employees, Michael L. Howard and Maurice Crowe, because of their union and, or concerted activities. The charges were filed by Michael L. Howard on May 1, 2003.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Lana Blackwell Trucking, LLC, the Respondent, is a corporation, with an office and place of business in Norman, Indiana, where it is engaged in the construction industry of providing dump truck hauling of asphalt and aggregate for its customers, including the Roger's Group. With services valued in excess of $50,000 to the Roger's Group, an enterprise within the State of Indiana, which purchased and received at its place of business in Bloomington, Indiana, goods valued in excess of $50,000 directly from points outside the State of Indiana, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Labor Relations Division of Indiana Constructors, Inc., herein called ICI-LRD, composed of various employers engaged in the business of highway, railroad, and underground utility construction, represents its employer-members in negotiating collective-bargaining agreements with labor organizations, including the Indiana Conference of Teamsters (ICT). ICT is admittedly a labor organization within the meaning of Section 2(5) of the Act.

Chauffeurs, Teamsters, Warehousemen, and Helpers, Local Union 135, a/w International Brotherhood of Teamsters (Teamsters Local Union No. 135), together with ICT (the Union), is admittedly a labor organization within the meaning of Section 2(5) of the Act.

Lana Blackwell, Respondent's owner and president, is admittedly a supervisor within the meaning of Section 2(11) of the Act and an agent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining:

> All the employees employed to perform any of the work described in "Article 2, Scope-Coverage" of the collective-bargaining agreement between the Union and the ICI-LRD.

The Union and the ICI-LRD reached a collective-bargaining agreement effective from April 1, 1999 to March 31, 2004, and the Respondent agreed to be bound by the terms and conditions of the collective-bargaining agreement. The Respondent also entered into a miscellaneous addendum to the collective-bargaining agreement.

II. FACTS

The Respondent, a small trucking firm headed by Lana Blackwell, was established in May 2002, as a female-owned company to qualify under State law, providing for disadvantaged business enterprises. As a unionized employer, the Respondent works primarily for the Roger's Group. Justin Blackwell Trucking is a nonunion company also engaged in the trucking industry, and is owned and operated by Justin Blackwell, husband of Lana Blackwell. Both companies operate at the same location and share the same facility, which is owned by both husband and wife.

The two alleged discriminatees, Maurice Crowe and Michael L. Howard, were among eight dump truckdrivers, employed by Lana Blackwell Trucking. Howard had worked for the Respondent since May 4, 2002, and Crowe had been employed since July 2002. Both men were mature and experienced drivers who, in the fall of 2002, started to voice their opinions to management about their own conditions of employment, as well as the working conditions of their fellow drivers. Their conduct in this regard resulted in the Respondent's decision in March 2003 not to recall them from layoff on December 27, 2002. By memorandum, dated December 27, 2002, the Respondent notified all employees that they were laid off and were free to sign up for unemployment insurance benefits. (GC Exh. 4.)

By memoranda, dated March 12, 2003, the Respondent notified each, Crowe and Howard, as follows (GC Exhs. 5, 6):

> You will not be recalled back to work with Lana Blackwell Trucking, LLC for the new year of 2003. Reference to the decision can be found in the provisions of the Heavy Highway agreement.

The Respondent also informed the Union, Teamsters Local 135, by memorandum of March 12, 2003, that four drivers, including Crowe and Howard, would not be recalled, stating inter alia, "The return of these employees will not be beneficial to the success of the company." (GC Exh. 7.) In March and April, 2003, the Respondent has recalled four employees from layoff and has hired a total of 13 dump truckdrivers, but the alleged discriminates were not among them.

The General Counsel submits that the Respondent's failure to recall Howard and Crowe was unlawful, because the decision was prompted by the employees' union activities, and because of their concerted conduct. The Respondent argues that it was not obligated to recall the employees under the terms of the collective-bargaining agreement, that their improper behavior towards management justified Respondent's action and that the failure to recall was not discriminatory.

III. ANALYSIS

Initially, the record shows that the Union considered the Respondent's failure to recall the employees, but the Union declined to pursue the matter based on its interpretation of the collective-bargaining agreement. The Respondent similarly argues that according to the employment security provisions of the agreement it was not obligated to recall Howard and Crowe. Article 14, section 8, of the agreement provides for project seniority based upon the jobsite for employees hired after April 1, 1999. Because Crowe and Howard were hired after that date, their seniority expired on December 31, 2002. Accordingly, so argues the Respondent, the Company was not obligated to recall the employees and "to the extent the General Counsel now claims that a right to recall exists under the highway agreement, this case should be deferred, pursuant to Collyer." (R. Br. p. 19.) However, the General Counsel does not rely on any contractual obligations of the Employer, but argues that the contract language does not shield the Respondent from its unlawful behavior, even if the Respondent possessed unfettered discretion as to which employees to recall from layoff.

Inasmuch as none of the parties relied on any contractual rights of the employees, it is clear that deferral of the matter to the grievance procedure in the collective-bargaining agreement is not at issue. Accordingly, the General Counsel's motion to reopen the record and to admit certain evidence relevant to the deferral issue is denied.

Although the employees may not have had any contractual rights to be recalled, the question remains whether the Respondent's decision not to recall Howard and Crowe was discriminatory and motivated by an antiunion purpose or because the employees had engaged in protected concerted activities. An employer's failure to recall employees from layoff motivated by union considerations is clearly violative of Section 8(a)(1) and (3). *Rushton & Mercier Woodworking Co.*, 203 NLRB 123 (1973), enfd. 502 F.2d 1160 (1st Cir. 1974). Moreover, actions by an employee to enforce the provisions of an existing collective-bargaining agreement are considered concerted activity protected by Section 7 of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). The conduct of a single employee may rise to protected concerted activity where such an employee acts on behalf of a fellow employee in regard to conditions of employment. *Guardian Industries Corp.*, 319 NLRB 542, 549 (1995). Accordingly, the issue presented in the case is whether the conduct in this regard by Howard and Crowe was the motivating factor in the Respondent's decision not to recall them. As summarized, the record clearly shows that both employees, who were highly experienced truckdrivers and well regarded by management and who were never disciplined, had engaged in union and concerted activities. The employer clearly knew of their protected activities, but resented it to such an extent that a decision was made not to recall them and to hire other drivers instead.

Michael Howard

The General Counsel has cited several incidents as illustrative of Howard's union and concerted activities. These incidents are also relied upon by the Respondent to demonstrate Howard's rude and disrespectful attitude toward Lana Blackwell as a justification for her decision not to recall him.

The first incident described by both parties occurred on September 6, 2002, in connection with employee, Greg Wright. Blackwell had ordered Wright, a dump truckdriver, to work on the following Saturday even though he had complained of an earache and wanted to see his doctor. Threatened with discharge if he did not follow Blackwell's order to report for work, Wright confided in Howard and fellow employee Tom Mitchell. On the same day, Howard met with Blackwell in the breakroom. Also present were Blackwell's husband, Justin Blackwell, Roger Smale, Respondent's dispatcher, and Mitchell. In no uncertain terms, Howard told Blackwell that she could not fire Wright for refusing to report for work if he had a doctor's excuse. Howard testified as follows about the conversation (Tr. 133):

> And I told her, "You are not going to fire Greg Wright if he goes to the doctor and gets a doctor's excuse and brings it back. You are not going to fire him. Now, if he don't come in after his doctor's appointment, or he don't bring in an excuse, then yes, you would have grounds to discipline him."

Blackwell similarly testified as to the substance of the conversation, and recalled that Howard further stated that they would file grievances with the Union. She recalled the conversation as follows (Tr. 76):

> And he told me that I—that he knows more about the Union than I do, and that they would definitely get his job back. He was yelling. He was screaming. He was red in the face. He embarrassed me in front of all my employees.

The exchange of opinions that day between Blackwell and Howard also involved the position of the Company's dispatcher, Roger Smale, as union steward. Howard told Blackwell (Tr. 133):

> Well, I told Lana Roger Smale . . . could not continue being our shop steward, lead man and a supervisor—in our eyes, a supervisor. It was a big conflict of interest . . . . The shop steward is supposed to represent its Union drivers. That is a shop steward's responsibilities . . . . And I said, "Roger Smale cannot be, no longer, our shop steward and supervisor at the same time." I said, "You can put him in that office and make him a supervisor. And that's fine. He can step down as shop steward and we will vote in another one. That's fine."

Blackwell's testimony corroborated the substance of the conversation: "He just said that it was a conflict for [Smale] . . . he cannot hold those two positions, that he can't fairly hold those two positions." (Tr. 77.) According to Blackwell, Howard "was just irate about it."

As a result of these discussions between Howard and Blackwell, Wright was ultimately excused from reporting to work on that Saturday, and Smale was no longer the union steward.

Another incident, where Howard confronted management on behalf of another employee happened on October 22, 2002, when Blackwell issued a verbal warning to Andrew Brown, a dump truckdriver. Brown had received the verbal warning on the prior day, October 21, 2002, because of his attitude towards Respondent's customers. As Howard was turning in his paperwork on that day, Justin Blackwell motioned for Howard to meet him in the parts room. Justin Blackwell accused him of contacting the Labor Board and said, "what business is it of yours, how I run my company?" Howard denied the accusation and said that he had not contacted anyone. Toward the middle of the conversation about Andrew Brown, Lana Blackwell entered the room. Howard said to her that he didn't "think that is proper grounds to write someone up, just for an attitude." He also told her that if she writes up Andy Brown, he would file a grievance, and would get it thrown out. She would become a laughing stock, according to Howard, and make the Company look stupid. She replied that he and Crowe were her two best drivers, but "We start too much shit." The Respondent has not denied this incident.

Finally, Howard was also involved in a dispute with management about Jan Mills, a driver employed by Justin Blackwell's Company. In October 2002, Howard looked at the Respondent's dispatch sheets to find his next driving assignments. He also noticed the dispatch sheets for Justin Blackwell Trucking lying alongside the others and noticed that Mills had been assigned to perform prevailing wage work on a Federal Government project. Howard informed fellow employee Crowe about the assignment, because Howard felt that Crowe should have performed the prevailing wage work.

Howard and Crowe confronted Justin Blackwell in the Respondent's lunchroom in the presence of dispatcher Smale, and informed Blackwell that union employees should have been assigned to union work or that Mills should have been paid the prevailing wage work. Blackwell agreed to pay the higher wages to Mills. Howard and Crowe also spoke with Lana Blackwell about this issue in October 2002, reminding her that the prevailing wage work should have been assigned to a union driver and that Mills should have been paid the appropriate wages. According to her testimony: "They were loud, obnoxious. When they made comments to me that's how they made their comments." (Tr. 67.) She also confirmed that Mills had approached her and her husband and informed them that Howard was trying to convince him (Mills) to file a charge against the Company for its failure to pay the prevailing wage.

The incidents summarized above convincingly show that Howard had engaged in concerted activities and union activities. His purpose was to promote the working conditions of fellow employees. He challenged management about its intentions to discipline employees, Wright and Brown, and he warned that he would file grievances with the Union. In both incidents, Blackwell relented. Wright was not discharged for his refusal to work and Brown's discipline was retracted. Moreover, Howard challenged the role of Roger Smale as a union steward while also operating as the Respondent's dispatcher. And Howard, with the assistance of Crowe, was instrumental to assure that Justin Blackwell would pay union wages to an employee who, without their involvement, would have been paid his regular pay. It clearly cannot be gainsaid that Howard's conduct was concerted and union related. *Caval Tool*, 331 NLRB 858 (2000); *Guardian Industries*, 319 NLRB 542 (1995). Lana Blackwell was not only aware of Howard's activities, but she responded positively to his initiatives.

According to Blackwell, Howard was considered a good employee; he had never been disciplined by the Respondent. However, the Respondent argues that in several incidents, "Howard was rude and disrespectful towards Lana, embarrassed her in front of other employees, intimidated her and humiliated her." (R. Br. p. 18.) His "disrespectful, angry and shocking outbursts that embarrassed and humiliated Lana," so characterized by the Respondent, occurred in the context of Howard's concerted activities. The record shows that Howard acted purposefully and emphatically towards management, and that he had occasionally raised his voice. But he was not insubordinate or disloyal to his Employer, nor did he engage in any misconduct. Their apparent differences in age and personality may account for Lana Blackwell's perception that Howard was rude and disrespectful. Lana Blackwell is relatively new as the manager and president of this operation, and she is also a wife and mother of young children, requiring her husband to step in during her occasional absence. She may easily have perceived as intimidating Howard's apparent expertise in union matters, as well as his long experience as a truckdriver and the ordinary demeanor of such employees. In any case, the record does not support a finding that Howard's conduct was sufficiently serious to deny him the protection of Section 7 of the Act. *Severence Tool Industries*, 301 NLRB 1166, 1169 (1991); *Guardian Industries Corp.*, supra at 542. This is so, because "there are certain parameters within which employees may act when engaged in concerted activities." *Consumer Power Co.*, 282 NLRB 130, 132 (1986). The relevant question in such cases is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service. Id. Clearly, the employee's conduct was not of such egregious nature. I accordingly find that Howard's conduct was protected by Section 7 of the Act. Where protected concerted activity is the basis for an adverse

action against an employee, it is not necessary to apply the *Wright Line*[1] analysis. *Caval Food*, 331 NLRB 858 (2000).

The Respondent advanced additional justifications, which I find to be trivial and pretextual and unrelated to Howard's protected concerted activities or his union activities. For example, Blackwell claimed that Howard ridiculed a Christmas card and a present received from her when he said over the CB radio to a driver of another trucking company, "he got a card from her and it brought tears to his eyes . . . . There wasn't nothing in it." (Tr. 284–85.) She also testified that Howard discarded into the trash a Christmas gift consisting of a stocking filled with candy and an ink pen. Howard testified that he did not throw the Christmas gift into the trash and he denied making fun of management with respect to the Christmas bonus. I credit his testimony and find, in any case, that these matters were simply a pretext for Blackwell's refusal to recall Howard.[2]

The General Counsel has clearly also met his burden under *Wright Line*, supra, by showing that the employee had engaged in union and protected concerted activities, that management was aware of it, and that animus against the protected conduct was a motivating factor in the employer's conduct. Once this showing is made the burden shifts to the Respondent that the same action would have taken place even in the absence of the protected conduct. The Respondent has clearly failed to meet that burden, for Howard was admittedly regarded as a good employee and as an excellent driver. But for his protected conduct, he would have been recalled in lieu of the other employees who were hired by the Company. I, accordingly, find that the Respondent violated Section 8(a)(1) and (3) of the Act.

Maurice Crowe

The record with regard to Crowe is similar in several respects. According to the Respondent, Crowe was not recalled, because of his attitude towards Lana and her lead driver, Smale. The Respondent refers to two incidents, one in September or October 2002. According to Blackwell, Crowe had failed to report some damage to his truck, and later told her that she did not need to know about it, because he had repaired the damage and taken care of it himself. This, according to the Respondent, upset Lana and was considered arrogant and condescending. I credit Crowe that he did not make the "not need to know" comment.

The other incident cited by the Company was a comment made by Crowe over the CB radio and directed at Smale. According to Smale, Crowe made the following remark (Tr. 286):

> Okay. He said that there was a milk crate at the shop that I could stand on, to look them in the eyes and that I could sit on to suck Justin Blackwell's dick.

Crowe testified that he did not make that crude comment about Smale, but that he said (Tr. 370):

> I told him we would make him a new milk crate where he could sit and kiss Justin's butt, and then he could stand and look us into the eye when he needed to be the boss.

Describing Smale as a little, short guy, Crowe testified that it was an ongoing thing between him and Smale for 20 years, which just "all of a sudden," got serious. In any case, the record shows that Crowe was never reprimanded nor disciplined for this or anything else during his tenure with the Respondent.

The Respondent's real objection to Crowe's continued employment was his union activity and his concerted activity, which Blackwell would not tolerate. Blackwell admitted that Crowe and Howard used their knowledge about the operations of Local 135 to tell her how to run her business, and she resented it. Blackwell admitted that Crowe complained about the employees' working conditions, and that he expressed his intentions to file grievances with the Union. The Respondent also admitted that Crowe was not recalled because of the attitude shown in expressing his complaints.

Blackwell's testimony shows that she resented Crowe's union activities. In the October 2002 conversation, when Crowe and Howard entered the breakroom and made a comment to Blackwell that employee Jan Mills had performed union scale work, which should have belonged to Crowe, they not only confronted Blackwell's husband Justin about the issue, but also Lana Blackwell. Crowe's comments were apparently justified, because the Company agreed to reimburse Mills. However, Blackwell described their demeanor as "loud, obnoxious . . . that's how they made their comments . . . always loud, to try to get my attention, I guess." (Tr. 67.) The record supports a finding that Crowe's conduct in this regard was union related and an effort to have the Respondent comply with the collective-bargaining agreement.

Crowe also joined Howard in confronting Blackwell in the parts room in October or November 2002, about the Respondent's intentions to discipline fellow employee Brown. Crowe complained that the Company had no work rules and suggested that it could not simply discipline an employee because of his attitude, or because management did not like Brown. As a consequence of the efforts of Crowe and Howard, the Respondent relented and refrained from taking any adverse action against Brown.

Blackwell denied that she and Crowe had such a discussion. She also did not recall a conversation with Crowe about the Company's lack of work rules. However, Crowe and Howard credibly testified that in October or November 2002, Howard spoke to Justin and Lana Blackwell about the Respondent's implementation of work rules. In that conversation, Howard proposed that Crowe should sit down with the shop steward Smale and the Company's representative to negotiate work rules leading to the Respondent's adoption of work rules. Howard also spoke with Justin Blackwell that Maurice Crowe should represent the drivers. When asked by Justin Blackwell what made Crowe so special that he should sit in on work rules, Crowe replied: "Well I have done this longer than you have been alive . . . I am fair. And the rest of the guys, you know respect me because I am older, I've done it and I'm fair." (Tr. 199–200.) While it was agreed between all participants to the

[1] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[2] I find the testimony of Crowe and Howard to be consistent and credible; however, Lana Blackwell was frequently reluctant to agree with her earlier statements made under oath. Her testimony was not always reliable.

conversation, including Lana Blackwell, that Crowe would represent the employees in an attempt to formulate acceptable work rules, such a meeting did not take place. Again, the record shows that Crowe's activities involving these issues constituted concerted activity.

When Blackwell testified that she decided not to recall Crowe because of his attitude, she was clearly motivated by Crowe's union activities and his protected concerted activities. Of significance in this regard is that she admitted, albeit grudgingly and only when confronted with her previously executed affidavit, that Maurice Crowe's and Michael Howard's attitude problems had to do with the union issues.

I cannot accept the Respondent's argument that its failure to recall Crowe was due to his "need-to-know comments regarding the equipment damage and the vulgar comment Crowe made about Smale." Blackwell's testimony in this regard is not credible and at odds with her affidavit and her general observations regarding Crowe's concerted and union activities. His conduct is clearly protected by Section 7 of the Act. According to the applicable authorities stated above, I find that the Respondent's failure to recall Maurice Crowe violated Section 8(a)(1) and (3) of the Act.

As already discussed above, the evidence with regard to Crowe, shows that he had engaged in these activities while employed at the Respondent's facility and that the Respondent's owner and president was not only aware of his activities, but also responded thereto. The Employer's animus against these activities was the motivating factor in the Employer's decision not to recall this employee. *Wright Line*, supra. The Respondent has failed to show that the same action would have taken place even in the absence of the protected conduct. Blackwell admitted that she never disciplined Crowe, and that he was punctual and had a good work record. Crowe's attitude, described by the Respondent as condescending, was revealed, not in the two episodes referred to by the Respondent, but in his forceful and successful conduct of furthering the employees' working conditions. It is also well settled that a forceful or condescending attitude displayed by an employee while engaged in union or concerted conduct does not render such activities unprotected.

CONCLUSIONS OF LAW

1. Lana Blackwell Trucking, LLC, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to recall from layoff and by discharging employees Michael L. Howard, and Maurice Crowe, because they engaged in protected concerted activities and, or union activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

4. The unfair labor practices have an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Further, the Respondent shall be required to recall Maurice Crowe and Michael L. Howard and offer them immediate and full reinstatement to their positions of employment and make them whole for any loss of wages and other benefits they may have suffered by reason of Respondent's unfair labor practices in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondent shall be required to post an appropriate notice, attached as an "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Lana Blackwell Trucking, LLC, its offers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to recall from layoff and discharging employees because they engaged in union or protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Within 14 days from the date of this Order, recall from layoff and offer Michael L. Howard and Maurice Crowe full reinstatement to their former jobs or, if those jobs no longer exist to substantially equivalent positions without prejudice to seniority or any other rights or privileges previously enjoyed. Make Michael L. Howard and Maurice Crowe whole for any loss of earnings and other benefits suffered as a result of the unfair labor practices against them in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful action and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause show, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Norman, Indiana, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 12, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

Dated, Washington, D.C. April 30, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
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An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to recall from layoff or discharge any employees because they engage in union or protected concerted activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, recall from layoff and offer Michael L. Howard and Maurice Crowe full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole, with interest, for any loss of pay they may have suffered as a result of this discharge.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of the employees and WE WILL, within 3 days thereafter, notify them in writing that we have done so and that we will not use the discharge against them in any way.

LANA BLACKWELL TRUCKING, LLC